

**SETHUEL KELLY (Representing the Vatuvalo Sub-Tribe –  
v- ATTORNEY-GENERAL (Representing the Commissioner  
of Lands)**

HIGH COURT OF SOLOMON ISLANDS  
**(FRANK O. KABUI, J)**

Civil Case No. 11 of 2000

Date of Hearing: 12<sup>th</sup> April 2002

Date of Ruling: 18<sup>th</sup> April 2002

*Mrs A.N. Tongarutu for the Plaintiff*

*Mr P. Afeau for the Defendant*

**RULING**

**(Kabui, J):** There are two applications for me to decide in this case. The first application is by Summons filed on 27<sup>th</sup> September 2001 by the Attorney-General seeking leave to file defence out of time. The second application is by an Amended Notice of Motion filed on 10<sup>th</sup> April 2002 by the Plaintiff seeking the following orders-

1. **Leave to commence summary proceedings against the Defendant.**
2. **Judgment be entered against the Defendant in that the Defence Statement was filed out of time and must be struck out.**
3. **In the alternative judgment be entered against the Defendant in that it has no defence to the action.**
4. **Costs of and incidental to this application to be borne by the Defendant.**
5. **Such other Orders as the Court deems fit to make.**

These two applications came before me on 11<sup>th</sup> April 2002 and I heard them together for the sake of convenience.

### **The Background**

By Writ of Summons and Statement of Claim filed on 18<sup>th</sup> January 2000, the Plaintiff claims \$1.39 million as money due and payable to his sub-tribe plus interest and costs. In response, the Attorney-General filed a Memorandum of Appearance on 31<sup>st</sup> January 2000. The Attorney-General filed his defence on 18<sup>th</sup> December 2000. The Plaintiff by Summons filed on 23<sup>rd</sup> July 2001 sought leave to commence interlocutory proceedings, judgment for filing the defence out of time and that the defence be struck out for disclosing no reasonable defence and costs. This Summons was heard by me on 26<sup>th</sup> September 2001 but was adjourned due to non-attendance by the Attorney-General. The Summons was relisted before me on 12 November 2001 but was again adjourned due to non-attendance by the Solicitor for the Plaintiff.

### **The Plaintiffs Amended Notice of Motion**

I will deal with the Plaintiff's application first again for the sake of convenience. There is no such thing as entering judgment for filing a defence out of time. There is however provision for entering judgment in default of defence under Order 29, rule 8 of the High Court (Civil Procedure Rules) 1964 "**the High Court Rules**". This however has to be done by way of motion for judgment. This is not

the case here because the Attorney-General did file his defence though late by some 10 months and 18 days. The defence filed by the Attorney-General cannot be simply ignored (**See Lawrence Lae and Willie Karejama v Valahoana Company Intergrated Development and Others, (Civil Case No. 269 of 1999)**). In that case I have cited above, the defence was filed 7 months late. I extended time in that case. In his affidavit filed in support of his application, the Attorney-General explained the reasons for the delay in filing his defence within time. I do not think the delay is unreasonable in this case. Also, I do not think the delay has in any way prejudiced the rights of the Plaintiff. I will refuse the application by the Plaintiff to enter judgment against the Attorney-General in this case. There is however another ground in the alternative. The Plaintiff has alleged that the Attorney-General has no good defence. If that is the case, the Plaintiff should have come to Court under Order 14 rule 1(a) of the High Court Rules and filed the necessary affidavit alleging that the Attorney-General does not have a good defence. The defence filed by the Attorney-General on 18<sup>th</sup> December 2000 speaks for itself. Paragraph 2 of that defence challenges the validity of the acquisition of Komarindi customary land which gave rise to the Agreement for lease upon which the Plaintiffs claims is based. The defence does therefore raise a fundamental point of law, which must be decided by the Court. (**See Ross Mining (SI) Limited and Gold Ridge Mining Limited v Willie Ronie and David Thuguvoda (Civil Case No. 294 of 1997 and Wespac Banking Corporation v R.D. & Sons Commercial Development Limited and Others (Civil Case No. 157 of 1999)**). I will also refuse the Plaintiff's application on this ground.

**The Attorney-General's Application**

This application is really the result of the Plaintiff's refusal to accept the Attorney-General's late filing of defence and the Plaintiff's belief that the Attorney-General does not have a good defence. As I have already said, the Attorney-General by his affidavit explained the reasons for the delay in filing his defence. I accept those reasons. I would grant leave to extend time. I will prescribe no time limit because the defence had already been filed on 18<sup>th</sup> December 2000. The defence remains as part of the pleadings in the main action. Costs will be cost in the cause.

**F.O. Kabui**

**Judge**